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In the Supreme Court of the United States

October Term, 1982

STATE OF OHIO, EX REL. HELEN EARNHART,
Petitioner,

vs.

OHIO POWER SITING BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

Whether, consistent with the "quality of notice" dimension to the Fourteenth Amendment's Due Process Clause, a State's statutory scheme, regulating construction of major utility facilities, may permit selection of an electric transmission line's route to be made via public hearing held pursuant to constructive notice, by newspaper publication, to a resident-owner, across whose property the proposed line will pass, whose name and address are known or easily ascertainable.

PARTIES BELOW

Petitioner, State of Ohio ex rel. Helen Earnhart, Plaintiff-Relator below.

Respondent, Ohio Power Siting Board, fka Ohio Power Siting Commission, Defendant-Respondent below.

Ohio Edison Company, Intervening-Respondent below.

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OPINIONS BELOW

There was no opinion delivered in the Court below.

JURISDICTION

The judgment of the Supreme Court of Ohio was dated and entered June 2, 1982. The Motion for Rehearing was denied per order dated June 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, to wit: Constitution of the United States, Amendment XIV, Section 1; Constitution of the State of Ohio, Article I, Section 19; and Ohio Revised Code (ORC) Sections 4906.01(B), 4906.04, 4906.06, 4906.07, 4906.10, 4906.12, 4903.10, 4903.11 and 4903.12, are set forth in Appendix *infra*, p. A5.

STATEMENT OF THE CASE

The Masury-Greenville Line ("Line") is a 138,000 volt electric transmission line, a "major utility facility" within the meaning of ORC 4906.01(B). The legislative purpose of ORC Chapter 4906, together with Respondent's administrative, due process responsibilities thereunder, are set forth in its Opinion and Final Order Granting a Certificate of Environmental Compatibility and Public Need With Conditions ("Certificate") reproduced, in pertinent part and with emphasis added, at Appendix, *infra*, p. A15.

When energized, the Line will affect the enjoyment of adjacent residential property in ways more tangible than the aesthetic repugnance to the sight of poles, wires and conductors. In its vicinity, the Line will produce electric and magnetic fields that, under certain weather conditions, emit audible noise; that cause some degree of radio and television noise interference; and "may induce perceptible charging current on very large objects under the line, such as a large truck." Through trimming and use of herbicides, maintenance of the Line

will affect vegetation. See Ohio Edison Company's *Site Report*, excerpts from which are reproduced at Appendix, *infra*, pp. A18-A21.

At all times relevant, and although an alternate route was and is still available, Line Section I was to have been constructed along a public right-of-way traversing Petitioner's residential real property abutting Miller Street, a rural highway in Trumbull County, Ohio. Petitioner lives in one of eleven houses located on Miller Street.

In May, 1977, Ohio Edison Company filed, with Respondent, its statutory application for the Line's Certificate; and thereafter complied with the constructive notice requirements of ORC 4906.06(B) and (C). The matter then proceeded to public hearing per the provisions of ORC 4906.07. On June 23, 1978, having never provided for Petitioner's personal notice of the application and hearing, although her name and address were known or, via public records, easily ascertainable, Respondent granted the application per ORC 4906.10(A). Subsequent applications to amend the Certificate were similarly filed and granted.

For want of actual notice of the filing and nature of the applications, and of the time and place for public hearing thereon, Petitioner did not thereat appear and testify relative to route selection for the Line. And, by the time she did learn of the existence and import of the Certificate, her opportunity to be heard on the matter had been extinguished per ORC 4906.12, 4903.10 and 4903.11.

On January 7, 1982, and by reason of the recourse strictures imposed by ORC 4903.12, Petitioner filed a Com-

plaint in Mandamus ("Complaint") in the Supreme Court of Ohio, invoking that Court's original jurisdiction to direct Respondent to provide her with actual notice of the filing and nature of the applications, and a meaningful opportunity to be heard on the matter of route selection for the Line; and to suspend the operation and effect of the Certificate, halting construction of the Line, lis pendens. In the Complaint, as grounds for mandamus, Petitioner raised the federal question of procedural due process guaranteed her under the Fourteenth Amendment to the United States Constitution.

On January 20, 1982, the Court allowed Petitioner an alternative writ in mandamus, suspending the Certificate's operation and effect, lis pendens. The Court then allowed Ohio Edison Company to intervene, as respondent. Thereafter, respondents below filed Motions to Dismiss and on June 2, 1982, after the parties had briefed the federal question raised, the Court sustained the motions and dismissed the Complaint, without opinion.

On June 30, 1982, in response to Petitioner's timely-filed Motion for Rehearing, the Court denied rehearing, without opinion.

Although the Line's construction has been or will soon be completed, Ohio Edison Company has not paid Petitioner compensation in money, or secured same by a deposit of money, a precondition of its ability to exercise condemnation powers under Article I, Section 19 of the Ohio Constitution.

ARGUMENT

A. The Supreme Court of Ohio Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be Settled by This Court.

Procedural due process, guaranteed under the Fourteenth Amendment to the U.S. Constitution, constituted the sole basis for Petitioner's Complaint in Mandamus below. The Supreme Court of Ohio dismissed that Complaint without opinion.

Where private, real property interests are affected by public expediency, the usual procedural due process considerations are adequate notice and meaningful opportunity to be heard on the matter of compensation for eminent domain "takings." *Bragg v. Weaver*, 251 U.S. 57, 64 L. Ed. 135 (1919); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L. Ed. 953 (1925); and *Walker v. Hutchinson*, 352 U.S. 112, 1 L. Ed. 2d 179 (1956).

Herein, there are no eminent domain proceedings. Yet, state law permits Petitioner's cognizable, real property interest to become impaired without providing her with adequate notice of the vehicle of impairment—public hearing on the matter of route selection for the Line. *Infra.*

Petitioner submits that this Court has not, but should settle the question posed: the application of procedural due process safeguards to uncompensated public use impairment (not "taking") of private property.

B. The Supreme Court of Ohio Has Decided a Federal Question in a Way in Conflict With the Applicable Decisions of This Court.

As the titled owner of residential real property abutting, but whose fee, over which the Line was to have been

constructed and energized, extends to the centerline of Miller Street, a rural highway, Petitioner asserted a property interest that is recognized, protected and entitled to certain benefits under the laws of the State of Ohio. *Dailey, et al. v. State*, 51 Ohio St. 348 (1894); *Ohio Bell Telephone Co. v. Watson Co.*, 112 Ohio St. 385 (1925); *Callan v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166 (1902); and *Yoder v. Electric Co.*, 39 Ohio App. 2d 113 (C/A Franklin, 1974). Such interest is accordingly comprehended within the meaning of "property" under the procedural guarantees of the Fourteenth Amendment's Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972); and *Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725 (1975).

Herein, the procedural due process safeguards of Petitioner's interest must include notice and a meaningful opportunity to be heard, on the matter of route selection for the Line, prior to deprivation of that interest. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865 (1950) and *Board of Regents v. Roth*, *supra*. As recently as *Greene v. Lindsey*, ... U.S. ....., 72 L. Ed. 2d 249 (1982), this Court opined:

> "The fundamental requisite of due process of law is the opportunity to be heard; furthermore, the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest, so that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Since Petitioner was entitled to such "reasonably calculated" notice of the Line's route selection proceeding, the final inquiry must be whether Ohio's statutory, constructive notice by newspaper publication, as opposed to personal notice to Petitioner, satisfied the "quality of notice" dimension to the due process clause. This inquiry is answered in the negative where, as here, Petitioner's name and address were known or easily ascertainable. See *Schroeder v. City of New York*, 371 U.S. 208, 9 L. Ed. 2d 255 (1962), citing *Mullane v. Central Hanover Bank & Trust Co., supra*, and quoting *New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 97 L. Ed. 333 (1953):

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice, ... Its justification is difficult at best."

See also, Walker v. Hutchinson, supra:

> "It is common knowledge that a landowner is rarely informed of proceedings against his property by mere newspaper publication."

Respectfully submitted,

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